1850

SUPREME COURT OF THE UNITED STATES.

No. 71.

PATRICK BURKE, PLAINTIFF IN ERROR,

vs.

WM. H. GAINES & WIFE, & AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ARKANSAS.

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GIDEON, Print.

THE UNITED STATES OF AMERICA, *sct:*

The President of the United States of America, to the judges of the Supreme Court of the State of Arkansas, greeting:

Because in the record and proceedings, in the rendition of a judgment in a plea or appeal which is in the said supreme court for the State of Arkansas, before you, between Patrick Burke, appellant, and William H. Gaines and Maria, his wife, Abbott Belding, Henry Belding, and George Belding, appellees, a manifest error hath happened to the great damage of the said Patrick Burke, as by his complaint appears; and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of December next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the honorable Roger B. Taney, chief justice of the [SEAL.] said Supreme Court of the United States, this 5th day of March, A. D. 1855, and the year of American independence the 79th.

Attest: WM. FIELD,
Clerk Circuit Court U. S. eastern dist. Arkansas.

Presented 5 March, 1855.

L. E. BARBER, *Cl'k.*

I, E. H. English, chief justice of the supreme court of Arkansas, allow the within writ of error.

March 5th, 1855. E. H. ENGLISH.

STATE OF ARKANSAS, *sct:*

In the Supreme Court.

In obedience to the mandate of the within writ of error, and the allowance thereof by the chief justice of our said supreme court, I send to the Supreme Court of the United States a transcript of the record in the cause therein, hereto attached.

In testimony whereof, I have hereto set my hand, as clerk of [SEAL.] said court, and affixed the seal thereof, at my office in Little Rock, this 12th day of July, A. D. 1855.

L. E. BARBER, *Clerk.*

STATE OF ARKANSAS.

In the Supreme Court.

Be it remembered, that at a supreme court of the State of Arkansas, begun and held at the court-house in the city of Little Rock, on the first Monday in January, A. D. 1855, before the Hon. Christopher C. Scott and David Walker, judges, and Hon. Thomas Johnson, special judge, (the Hon. E. H. English, chief justice, being disqualified,) were the following proceedings in the case of—

PATRICK BURKE, appellant,
vs.
WILLIAM H. GAINES and MARIA GAINES, his wife, Albert Belding, Henry Belding and George Belding, appellees.
} Appeal from Hot Spring circuit court.

Be it remembered, that heretofore, to wit, on the 28th day of March, A. D. 1854, the said appellant filed in the office of the clerk of said supreme court the transcript of the record of said circuit court in this cause, which is in the following words:

Record of Circuit Court.

STATE OF ARKANSAS,
County of Hot Spring, ss:

Pleas before the Hon. John C. Murray, judge of the 2d judicial circuit of said State, on the 28th day of February, 1853, at a circuit court begun and held in and for said county of Hot Spring, at the court-house of said county, on the last Monday of February, in the year aforesaid, in the following cause, to wit:

WILLIAM H. GAINES and MARIA GAINES, his wife, Albert Belding, Henry Belding, and George Belding, plaintiffs,
vs.
PATRICK BURK, defendant.
} Ejectment.

Declaration.

STATE OF ARKANSAS,
County of Hot Spring, set.

In the Hot Spring circuit court, to the February Term thereof, 1853.

William H. Gaines and Maria Gaines, his wife, formerly Maria Belding, Albert Belding and Henry Belding, by attorney, and George Belding, a minor, by James M. Curran, his next friend, complain of Patrick Burk, defendant herein, of plea of ejectment.

For said plaintiffs declare and say, that heretofore, to wit, on the 20th day of December, A. D. 1851, at the county aforesaid, they, the said plaintiffs, were lawfully entitled to the possession of certain premises, with the appurtenances, situate in said county of Hot Spring, and within the jurisdiction of this court, to wit, a certain tract or parcel of

land known and described upon the plats of the public surveys as the southwest quarter of section thirty-three, in township two south, of range nineteen west, containing one hundred and sixty acres, together with the buildings, houses, improvements, privileges, appurtenances, and rights thereunto appertaining and belonging; and said plaintiffs being so entitled to the possession thereof, the said defendant afterwards, to wit, on the day and year last aforesaid, at the county aforesaid, entered into and upon the said premises and ejected the said plaintiffs therefrom, and unlawfully withholds from said plaintiffs the possession thereof. Therefore, said plaintiffs say they are injured and have sustained damages the sum of two thousand dollars; and therefore they sue, &c.

WM. H. GAINES & MARIA GAINES,
his Wife,
ALBERT BELDING, HENRY BELDING,
By CURRAN, their attorney,
GEORGE BELDING, a minor,
By JAMES M. CURRAN, his next friend.

CLERK'S OFFICE OF HOT SPRING CIRCUIT COURT,
January 15, 1853.

On application of George Belding, a minor, I do hereby constitute and appoint James M. Curran to appear and prosecute the suit to be founded upon the foregoing declaration, as the next friend of the said George, according to the statute in such cases made and provided.

Attest: JNO. P. EMERSON, *Clerk*.

I do hereby accept the foregoing appointment, and consent to appear for and act as the next friend of said George Belding, in the prosecution of said suit. J. M. CURRAN.

January 15, 1853.

Filed in my office, and writ issued, on the 15th day of January, 1853.
JNO. P. EMERSON, *Clerk*.

STATE OF ARKANSAS,
County of Hot Spring, ss:

The State of Arkansas, to the sheriff of Hot Spring county, greeting:

You are hereby commanded to summon Patrick Burk, if he be found within your bailiwick, to appear before the judge of our circuit court of Hot Spring county, at the court-house in the county aforesaid, on the first day of our next February term, at a court to be holden on the last Monday of February, A. D. 1853, then and there to answer William H. Gaines and Maria Gaines, his wife, formerly Maria Belding, Albert Belding, Henry Belding, and George Belding, of a plea of ejectment, to damages of said plaintiffs of two thousand dollars, and that you make due return of this writ to our said court.

In testimony whereof, I have hereunto set my hand, as clerk of said circuit court, and affixed the seal of office, this 15th day of
[L. S.] January, 1853, and of the independence of the United States the 77th year. JNO. P. EMERSON, *Clerk*.

I do certify that I executed the within upon the within named Patrick Burk, at Hot Springs, in Hot Spring county, by reading the contents in his presence and hearing, the 26th day of January, A. D. 1853.

JOSEPH JESTER, *Sheriff*.

Proceedings had on the 2d day of March, 1853.

WILLIAM H. GAINES and MARIA, his wife, Albert Belding, Henry Belding, George Belding,
vs.
PATRICK BURK.
} Ejectment.

Filing Plea.

Came the defendant, by attorney, and, on leave asked and obtained, files his plea herein.

ARKANSAS, *sct.*

In Hot Spring Circuit Court—February Term, 1853.

WILLIAM H. GAINES et al.
vs.
PATRICK BURK.
} Ejectment.

Plea.

Came said defendant and says, that he is not guilty of the trespass or ejectment, or either of them, in said declaration mentioned, and laid to his charge; and of this he puts himself upon the country, &c.

RECTOR & TRIGG, *Attys.*

Filed March 2d, 1853. JNO. P. EMERSON, *Clerk*.

Proceedings had on the 4th day of March, 1853.

WILLIAM H. GAINES and MARIA GAINES, his wife, Albert Belding, Henry Belding, and George Belding,
vs.
PATRICK BURK.
} Ejectment.

Came the parties, by attorney, and on leave asked and obtained, said Burk files his motion for continuance herein, which is resisted, and is submitted, and by the court sustained.

ARKANSAS, *sct.*

Hot Spring Circuit Court—February Term, 1853.

WM. H. GAINES et al.
vs.
PATRICK BURK.
} Ejectment.

Comes defendant's counsel and moves the court for the continuance of this cause until the next term of this court, upon the ground that,

for the want of the testimony of the surveyor general of the United States for the State of Arkansas, and copies or exemplifications of certain maps, papers, &c., on file in said surveyor's office, and copies of certain instructions and decisions made by the land officers at Washington city, defendant cannot safely proceed to trial without prejudice.

That by said papers and the testimony aforesaid, defendant expects to show that the pretended claim of the plaintiffs to the land in question is null and void and of none effect.

From counsel's knowledge of the case, he can safely say, the application for continuance is not made for delay, but that justice may be done, &c.

H. M. RECTOR,
Counsel for Def't.

Filed March 4, 1853.

JNO. P. EMERSON,
Clerk.

Therefore, it is by the court considered, that said plaintiffs recover against said Burk all the costs of this term, in this behalf expended. And this suit is continued.

On leave asked and obtained by consent, plaintiffs take issue, in short, on the record, on the plea of not guilty herein.

And afterwards, to wit:

STATE OF ARKANSAS,
County of Hot Spring.

At a circuit court begun and holden in and for the county of Hot Spring, in the State of Arkansas, at the court-house in the town of Rockport, on the last Monday of August, 1853, being the 29th day of said month: present, the honorable John C. Murray, judge of the second judicial circuit of said State.

Proceedings had on the 31*st day of August*, 1853.

W. H. GAINES and others
vs.
PATRICK BURK. } Ejectment.

Came the parties, by attorneys, and on motion, and by consent, it is ordered that this suit be continued.

And afterwards, to wit:

STATE OF ARKANSAS,
County of Hot Spring.

At a circuit court begun and holden in and for the county of Hot Spring, in the State of Arkansas, at the court-house in the town of Rockport, on the last Monday of February, 1854, being the 27th day of said month: present and presiding, the honorable John C. Murray, judge of the second judicial circuit of said State.

Proceedings had on the 1*st day of March*, 1854.

WILLIAM H. GAINES, and MARIA, his wife, ALBERT BELDING, HENRY BELDING, and GEORGE BELDING, vs. PATRICK BURK. } Ejectment.

Came the parties, by attorney, and on motion it is ordered that a jury come; and thereupon came a jury of good and lawful men, to wit: Merit House, Hampton Funk, Isaac Morrison, John Vantrice, John Moore, Leander M. Alford, John Manning, Edmund Careley, William W. Brice, Robert Gibbons, William J. Nabors and John Gillis, who were duly elected, empanneled and sworn in this case; and after some progress in the testimony adjourned, together with this case, until to-morrow morning, half-past eight o'clock.

Proceedings had on the 2*d day of March*, 1854.

WILLIAM H. GAINES, and MARIA, his wife, ALBERT BELDING, HENRY BELDING, GEORGE BELDING, vs. PATRICK BURK. } Ejectment.

Trial, Verdict and Judgment.

Came again the parties, by attorney, and came again the jurors who on yesterday were adjourned until to-day, and the jurors aforesaid heard the residue of the evidence adduced, the charge of the court, and the argument of counsel, and retired to consider of their verdict, and after some time returned into court and returned their verdict as follows, to wit: "We, the jury, find that the defendant is guilty of unlawfully withholding from the plaintiffs the following described premises, to wit: all that portion of the quarter section of land mentioned in the declaration, described as follows, to wit, all that portion of said quarter section enclosed by the fence or enclosure now surrounding on three sides a certain tenement known as Burk's store-house, including the land on which said store-house is situate, the said store-house being in what is known as the Hot Spring valley, fronting on the west side of the stage-road leading from the Hot Springs to Little Rock; and also a certain tenement now occupied by one Jacob W. Parker, including all the land enclosed by the fence now surrounding the same, and all the enclosures adjoining and connected with the same; the said last-mentioned tenement and enclosures being below and south of the point where said stage-road now crosses the Hot Spring creek, west of said stage-road, and between that road and the road leading south from the Hot Spring to the Washita river, in manner and form as alleged; and that said plaintiffs have sustained damage, by reason thereof, in the sum of one hundred dollars, and that said defendant has never been in possession of any other portion of said quarter section.

"MERIT HOUSE."

Therefore, it is by the court considered and adjudged that said plaintiffs, William H. Gaines and Maria, his wife, Albert Belding, Henry Belding and George Belding, do have and recover of and from said defendant, Patrick Burk, the possession of the following described premises, to wit: all that portion of the quarter section of land mentioned in the declaration, (being the southwest quarter of section thirty-three, in township two, south of range nineteen west,) described as follows, to wit, all that portion of said quarter section enclosed by the fence or enclosure now surrounding on three sides a certain tenement known as Burk's store-house, including the land on which said store-house is situate, the said store-house being in what is known as the Hot Spring valley, fronting on the west side of the stage-road leading from the Hot Springs to Little Rock; and also a certain tenement now occupied by one Jacob W. Parker, including all the land enclosed by the fence now surrounding the same, and all the enclosures adjoining and connected with the same; the said last mentioned tenement and enclosure being below and south of the point where said stage-road crosses the Hot Spring creek, west of said stage-road, and between that road and the road leading south from the Hot Springs to the Washita river; and also the said sum of one hundred dollars, for their damages so sustained and assessed as aforesaid, by reason of the detention of said premises, together with all their costs in this behalf expended.

And it is by the court further ordered and considered, that a writ of possession do issue in this behalf, commanding the officer to whom it may be directed to deliver to the plaintiffs possession of the said premises, and also to levy and collect the damages and costs as in executions on judgments in personal actions, according to the statutes in such cases made and provided.

Proceedings had on the 3d day of March, 1854.

WILLIAM H. GAINES, and MARIA, his wife, late Belding, ALBERT BELDING, HENRY BELDING, and GEORGE BELDING, plt'ffs, vs. PATRICK BURK, defendant. } Ejectment.

Signing, &c., Bill of Exceptions.

And now, on this day, came said parties, by their respective attorneys, and said defendant tenders his bill of exceptions herein, saving sundry questions raised during the progress of the cause, time having been given him to present such exceptions, which exceptions are signed, sealed, and made part of the record herein.

Bill of Exceptions.

ARKANSAS, *sct.*

In the Hot Springs Circuit Court.—February Term, A. D. 1854.

WILLIAM H. GAINES et al.
vs.
PATRICK BURK. } Ejectment.

Be it remembered, that on the trial of this cause the said plaintiffs, to maintain their action and to make out their title to the premises in question, offered and proposed to read in evidence to the jury the following certificate, letters and instructions, to wit:

Receiver's Receipt and Note.

RECEIVER'S OFFICE, AT WASHINGTON,
ARKANSAS, *December 15th*, 1851.

No. 6545.

Received of Maria Gaines, wife of Wm. H. Gaines, formerly Maria Belding, Albert Belding, Henry Belding and George Belding, the heirs and legal representatives of Ludovic Belding, deceased, of Hot Spring county, in the State of Arkansas, the sum of two hundred dollars, in full for the southwest quarter of section thirty-three, (33,) in township two, (2,) south of range nineteen (19) west, containing one hundred and sixty acres, (160,) according to the return of the Surveyor General, at $1 25 per acre. According to the instructions, I note this entry interferes with the New Madrid location of Francis Langloise on the same lands, and also that it embraces lands directed to be reserved by the act of Congress of 20th April, 1832; and is only permitted to be made under the decision of the Secretary of the Interior, under date of November 21st, 1851, and the instructions of the Commissioner of the General Land Office, under of November 25th, 1851, in accordance with said decision.

"B. F. HEMPSTEAD, *Receiver.*"

Instructions.

GENERAL LAND OFFICE, *November 25th*, 1851.

GENTLEMEN: The papers accompanying your letters of the 18th and 24th March last, in reference to the claim of the Hot Springs in Arkansas, having been submitted to the Secretary of the Interior for his action on the legal point in the case, to wit, the reservation of the land by the act of Congress, they were returned to this office for its decision on the respective merits of the pre-emption claims, irrespective of this question.

On the 26th of August this office returned the papers, with its decision adverse to the claim of the heirs of John Percifull, and in favor of that of the heirs of Ludovicus Belding; it agreeing with you, both as to the establishment of the facts of cultivation in 1829, and posses-

sion on the 29th day of May, 1830, and regarding the objections of the receiver, founded upon the opinion that those acts were performed as the tenant of another, as not affecting the validity of the claim.

On the 14th ult. this office received the opinion and decision of the Secretary of the Interior, dated the 10th of the month, in which he sustains the existing validity of the act of 20th April, 1832, it not having been repealed or affected by any subsequent law, and that therefore none of the claims preferred for the land are of any legality.

On the said 14th ult. an application was made by the attorney of the heirs of Belding for permission to make an entry of said claim, "in order that they may be placed in a proper position for the assertion of their rights hereafter in the courts," stating that of course under the decision of the Secretary they should not ask for a patent.

This was refused by this office, and an appeal from that action taken to the Secretary of the Interior, who, on the 21st inst., addressed to this office a letter, a copy of which is herewith enclosed.

In accordance with the direction of the Secretary therein contained, you are instructed to permit the heirs of Ludovicus Belding to make payment for the S.E. qr. sec. 33, T. 2 S., R. 19 W., as containing 160 acres, and in addition to the ordinary entry thereof upon your books, and the return to this office, you will note the fact of its interfering with the New Madrid location of Langloise, of its embracing land directed to be reserved by act of 20th April, 1832, and said entry is permitted under the Secretary's decision of 21st November, 1851; similar annotations will be made on the receiver's receipt and register's certificate.

Respectfully, your ob't serv't,

J. BUTTERFIELD,

Commissioner.

REGISTER AND RECEIVER,
Washington, Ark.

Letter of Sec'y Interior.

DEPARTMENT OF THE INTERIOR,
Washington, Nov. 21st, 1851.

SIR: Upon consultation with the Attorney General, and after full consideration of the application of A. H. Lawrence, esq., attorney for the heirs of Ludovicus Belding, one of the claimants to the Hot Springs of Arkansas, on appeal from your decision of the 15th ultimo, against permitting said heirs to make an entry under the act of 29th May, 1830, and 14th July, 1832, I have concluded that it will be proper, and in accordance with precedents, to permit them to do so, and you will therefore instruct the register and receiver accordingly. Said entry will remain subject to the same power of revision and control by the General Land Office, and this Department, as may be lawfully exercised over any ordinary entry. The Government will still hold the ultimate power of protecting its own rights, while the claim-

ants will be merely placed in a position to contest the adverse claims of others to the same land.

I am, sir, very respectfully, your ob't servant,

ALEX. H. H. STUART,
Secretary.

The COMMISSIONER OF THE GENERAL LAND OFFICE.

Application to Enter.

No. 6545.

LAND OFFICE,
WASHINGTON, ARKANSAS, *December* 19*th*, 1851.

We, Maria Gaines, wife of William H. Gaines, late Maria Belding, Albert Belding, Henry Belding, and George Belding, heirs and legal representatives of Ludovicus Belding, deceased, of Hot Spring county, Arkansas, do hereby apply to purchase the southwest quarter of section thirty-three, (33,) in township two (2) south, of range nineteen (19) west, as containing one hundred and sixty (160) acres, for which we have agreed with the register, acting under instructions from the Commissioner of the General Land Office, bearing date 25th of November, 1851, to give at the rate of one dollar and twenty-five cents per acre.

A. BELDING,
MARIA GAINES,
HENRY BELDING,
GEORGE BELDING.

Register's Certificate of Sale and Note.

I, William H. Etter, register of the land office at Washington, Arkansas, do hereby certify that the tract above mentioned is sold as containing one hundred and sixty acres, as mentioned above, and the price agreed upon is one dollar and twenty-five cents per acre.

WM. H. ETTER, *Register.*

Note.—In accordance with the instructions, I note the interference of this entry with the New Madrid location of Langloise, of it embracing land directed to be reserved by act of the 20th of April, 1832, and that the entry is permitted to be made under the decision of the Secretary of the Interior, of the 21st of November, 1851, transmitted to this office by the Commissioner of the General Land Office, under date of the 25th of November, 1851.

WM. H. ETTER, *Register.*

Register's Certificate.

REGISTER'S OFFICE, WASHINGTON, ARKANSAS,
January 19, 1853.

I, William H. Etter, register of the land office at Washington, Arkansas, do hereby certify, that foregoing pages contain a true copy of the letters received from the Commissioner of the General Land Office, the application filed, and the annotation on the tract book in this office, under said instructions.

WM. H. ETTER, *Register.*

To the introduction and reading in evidence of which said certificate and accompanying letters and documents, and each and every of them, defendant objected at the time, and moved to exclude the same; but his objections were overruled by the court, and said certificate and accompanying letters and documents were permitted to be, and were, read accordingly in evidence to the jury; to which opinion and proceeding of the court in so refusing to exclude said several papers, and every of them, and in permitting the same to be read and given in evidence to the jury, defendant excepted at the time, and had time given him to prepare and tender his exceptions in respect thereof.

Admission of Facts.

Defendant then admitted in open court that plaintiffs were the heirs at law, and the sole heirs at law of Ludovicus Belding, deceased, and that William H. Gaines had, before the issuance of said certificate, intermarried with said Maria, one of the said heirs, and ever since has been, and still is, husband of said Maria; and that defendant has been, before the time of, and ever since the institution of this suit, in possession of the certain portion of the premises in the declaration mentioned, which is named and specified in the verdict and judgment herein rendered, and those from whom he holds and claims, connecting his possession with theirs, have been in possession of the same for seven or eight years past. Plaintiff then proved that the store-house occupied by defendant was worth $10 per month, from 1st January, 1852, to this time, and the other tenement so occupied by defendant was worth the same sum per month for the same period. Here plaintiffs closed their cause.

Offers of proof by Defendant.

Whereupon the said defendant offered to prove and establish before the jury the following facts, to wit: That from about the year 1831 until the present time the premise sued for had been occupied by various persons, and a town had been built up thereon, such persons holding under various claims to pre-emptions and a New Madrid location; but defendant, and those under whom he claims, had no other title than that of mere occupancy as squatters; that no proof of any pre-emption to said lands in said Ludovicus, or Ludovic Belding or plaintiffs, to the lands in controversy, ever was made or offered before the proper land officers until 1838 or 1839, but such proof thereof was made within one year after the United States surveys were completed and the plats thereof returned and filed in the proper land office; that no final action ever was had upon the proof, in respect to the said pre-emption right, by the inferior land office, but the proof and papers in respect thereof was transmitted to the General Land Office, where they remained until 1849 or 1850, when the same, with all the other pre-emption claims to the premises, were remitted to the land office below to take further proof in respect thereof, and to decide and adjudicate upon the facts involved; and upon the return made by those officers to the General Land Office, where the same was disposed of, as shown by the papers and docu-

ments used in evidence on the part of the plaintiffs in this cause, all the claimants to the Hot Springs being notified and being in attendance, where the proof was taken before said district land officers as last aforesaid; to which evidence plaintiffs, for the purposes of this trial, but none other, admitted to be true as matter of fact, but objected to its admissibility upon grounds of incompetency and irrelevancy. And upon consideration thereof, the court excluded and refused to permit to go in evidence to the jury any portion or part of any such proof so offered to be made as aforesaid; to which opinion and proceedings of the court, in so excluding such evidence so offered as aforesaid, said defendant excepted at the time, and had time given him to prepare and tender his exceptions in respect thereof; said plaintiffs then admitted that the premises in controversy were part of, and included in the reservation of 4 sections of land, embracing the Hot Springs in Arkansas, made by the act of Congress of the 20th April, 1832.

Plaintiff's Instructions.

Which was all the evidence given or offered in the cause; whereupon said plaintiffs moved the court to give the jury the following instructions, to wit:

1st. That the papers and documents read in evidence by the plaintiffs show sufficient title, and are sufficient for them to maintain this action against the defendant, in case he was at the commencement of this suit in possession of any part of the lands therein mentioned, to wit, the S. W. $\frac{1}{4}$ of sec. 33 in T. 2, S. of R. 19 W.

2nd. That the plaintiffs are entitled to recover by way of damages, in case they have shown title in accordance with the principles stated in the first instruction, the reasonable rents and profits of the land possessed or occupied by him from the first day of January, A. D. 1852, to this time. To each and every of which instructions defendant objected at the time; but the court overruled the objections, and gave to the jury both said instructions. To the giving of each and all which instructions defendant excepted at the time, and had time given him to prepare and tender his exceptions in respect thereof.

Def'ts Instructions.

Whereupon, said defendant moved the court to instruct the jury as follows, to wit:

1st. Plaintiffs must recover, upon the strength of their own title, and a mere occupancy can defeat this action, unless plaintiffs have shown such title as by law enables them to recover in this form of action.

2d. That the certificate of entry, and documents presented therewith by plaintiffs, are merely void, and confer no title upon plaintiffs, and, upon any title shown thereby, plaintiffs are not entitled to recover in this action as against this defendant.

3d. That the lands in controversy were reserved from sale by act of Congress of the 20th April, 1832, and, unless plaintiffs have shown that their title thereto accrued or commenced prior to that time, the jury should find for defendant.

4th. That unless plaintiffs have proven to the satisfaction of the jury, that proof of the pre emption right of L. Belding, or plaintiffs, was duly made prior to the 29th May, 1831, before the proper land officers, said lands were withdrawn from the power of the United States land officers, by the act of 20th April, 1832. And such officers had no power or right to grant a pre-emption right upon or to, or to sell the said land, and in that case said plaintiffs have no right whatever to recover in this action.

5th. That the certificate and evidence adduced by plaintiffs in this cause are no proof whatever of any title or right in plaintiffs prior to the date of said certificate, and said lands being reserved from sale by act of 20th April, 1832, the jury can, upon no principal, presume or infer that their title accrued or commenced prior to the said act of reservation. All of which instructions the court wholly refused to give, except said first instruction which was given; to which action and refusal of the court so to give such instructions, and each and every of them, said defendant excepted at the time, and had time given him to prepare and tender his exceptions in respect thereof.

And now, to the end to save and to preserve the several matters and exceptions aforesaid, said defendant presents his bill of exceptions, and prays the same may be signed, sealed, and made part of the record herein, which is done at this same term, this 3rd day of March, A. D. 1854.

Witness my hand and seal as judge of said court, the day last written.

J. C. MURRAY, [SEAL.]
Judge of Hot Spring circuit court.

Filed 3d March, 1854.

JNO. P. EMERSON,
Clerk.

Proceedings for Appeal.

Whereupon said defendant came into open court, and files his motion and affidavit for an appeal from the decision and judgment herein rendered, to the supreme court of the State of Arkansas, which appeal the court hereby grants and allows, and that such appeal shall operate as a stay and supersedeas of all execution upon said judgment, until the supreme court shall decide the same upon recognisance being entered. And thereupon, the said Patrick Burk, a principal, and Edmund Carley, Robert W. Gibbons and John Gibbons, as securities, personally appeared in open court here, and jointly and severally acknowledged themselves to owe and be indebted unto the said William H. Gaines and Maria Gaines, his wife, Albert Belding, Henry Belding, and George Belding, in the sum of eight hundred dollars, to be levied of their respective goods and chattels, lands and tenements; to be void, however, on condition that said appellant, Patrick Burk, will prosecute his appeal with due diligence to a decision in the supreme court; and that if the judgment appealed from be affirmed, or his appeal dis-

missed, he will pay whatever of debt, damages and costs have been recovered against him by the judgment of the circuit court, together with interest that shall accrue thereon, or that he will otherwise perform the judgment of the circuit court, and that he will pay the costs and damages that may be adjudged against him in the supreme court upon his appeal.

And it is ordered, that the clerk of this court forthwith transmit to said supreme court a true and perfect transcript of the record herein.

Hot Spring Circuit Court—February T., A. D. 1854.

WILLIAM H. GAINES et al.
vs.
PATRICK BURK. } Ejectment.

Came said defendant and prays an appeal to the supreme court of the State of Arkansas, from the judgment herein rendered, and said defendant being duly sworn in open court, states on oath, that this appeal is not made or taken for vexation or delay, but because affiant verily believes he is aggrieved by the judgment of the court herein rendered.

PATRICK BURK.

Sworn to and subscribed in open court, March 3d, 1854.

JNO. P. EMERSON,
Clerk.

Filed March 3d, 1854.

JNO. P. EMERSON,
Clerk.

STATE OF ARKANSAS,
County of Hot Spring.

I, Jno. P. Emerson, clerk of the circuit court in and for the county aforesaid, do hereby certify, that the foregoing and preceding twenty-four pages contain a true, perfect, and complete transcript of the record and proceedings had in the cause therein mentioned.

In testimony whereof, I have hereunto set my hand as clerk, [L. S.] and affixed the seal of said court at my office, in Rockport, this 13th day of March, A. D. 1854.

JNO. P. EMERSON,
Clerk.

Proceedings in Sup. Court.

And afterwards, to wit, at a supreme court of the State of Arkansas, begun and held at the court-house in the city of Little Rock, on the first Monday in July, A. D. 1854, were the following proceedings in said cause, on the 6th day of July.

Filing Ass't.

At this day comes said appellant by his attorney, and on motion it is ordered, that his assignment of errors be filed, and thereupon the same is filed. And said assignment of errors is in the following words:

Ass't of Errors.

Comes said plaintiff and says, that in the record and proceedings aforesaid, as well as in the giving of judgment aforesaid, there is manifest error in this, to wit: 1st. That the court below received and permitted to go to the jury improper evidence, on the part of said Gaines and others, and against the objections of said plaintiff.

And in this, to wit: 2d. That the court below erred in refusing certain instructions, moved by said Burk in the court below.

And in this, to wit: 3d. That the court below gave certain instructions improperly asked upon the part of the said Gaines et al.

And in this, to wit: 4th. That the judgment aforesaid, in form aforesaid rendered, was rendered in favor of said Gaines and others, and against said appellant; whereas, by the law of the land, the same should have been rendered in favor of said Burk, and against said Gaines and others.

And for these and other errors therein manifestly appearing, said appellant prays the judgment aforesaid, in form aforesaid rendered, *was rendered*, may be in all things reversed, with costs.

PIKE & CUMMINS, *Atto's.*

And afterwards, to wit, on the 8th day of July, of said term, were the following proceedings:

Filing Joinder.

At this day come said defendants, by their attorney, and, on motion, it is ordered that their joinder in error be filed; and thereupon the same is filed; which said joinder is as follows:

Joinder.

Come the said appellees, by attorney, and say, there is no error in the record, proceedings, or judgment rendered in the court below, and therefore pray that the same may in all respects be affirmed.

CURRAN & GALLAGHER, *Atto's.*

And afterwards, to wit, on the 31st day of July, of said term, were the following proceedings:

Submission.

At this day come said appellant and appellees, by their attorneys, and this cause is submitted on the briefs filed, and by the court taken under advisement.

And afterwards, to wit, on the 23d day of February, A. D. 1855, of said term of our supreme court, begun and held as aforesaid, on the first Monday in January, A. D. 1855, to which term this cause was continued by operation of law, were the following proceedings, to wit:

Judgment.

This cause came on to be heard upon the transcript of the record of the circuit court of Hot Spring county, and was argued by counsel; on consideration whereof it is the opinion of the court that there is no error

in the proceedings and judgment of said circuit court in this cause: It is therefore considered by the court that the judgment of said circuit court, in this cause rendered, be, and the same is hereby, in all things affirmed, with costs. It is further considered that said appellees recover of said appellant all his costs in this court, in this cause expended, and have execution thereof.

And afterwards, to wit, on the 26th day of February, of said term, were the following proceedings, to wit:

Filing Petition for Reconsideration.

At this day comes said appellant, by his attorney, and, on motion, it is ordered that his petition for reconsideration be filed; and thereupon the same is filed; which said petition is as follows, to wit:

Appellant most respectfully petitions the court for a reconsideration of the decision in this case, on grounds to be stated in an argument which may be filed after an opportunity of examining the opinion.

PIKE & CUMMINS.

And on the 6th day of March, 1855, were the following proceedings:

Petition refused.

The court being sufficiently advised of the petition for reconsideration in this cause, it is ordered that the same be denied.

And afterwards, to wit, on the 5th day of March, A. D. 1855, came said appellant, by his attorney, and presented to the clerk of said supreme court a writ of error issued by the clerk of the circuit court of the United States for the eastern district of Arkansas, commanding our said judges to send the record and proceedings in said cause to the Supreme Court of the United States, which said writ of error is allowed by the chief justice of our said supreme court; and at the same time filed a copy of said writ of error for said appellees; and also the bond of said appellant, approved by our said chief justice, and which is in the following words:

Bond.

Know all men by these presents, that we, Patrick Burke, as principal, and Wm. Gardner, J. T. Fairchild, as securities, are held and firmly bound unto the above-named Wm. H. Gaines and Maria, his wife, Albert Belding, Henry Belding, and George Belding, in the sum of three hundred dollars, to be paid to the said parties above-named, their executors, or administrators; to which payment well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents; sealed with our seals and dated this 5th day of March, 1855. Whereas the above named Patrick Burke hath prosecuted a writ of error to the Supreme Court of the United States, to reverse the judgment rendered in the above entitled suit by the supreme court of the State of Arkansas: Now, therefore, the condition of the above obligation is such, that if the above-named Patrick Burke shall prosecute

his writ of error to effect, and answer all damages and costs, if he shall fail to make good his plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

Witness our hands and seals, this day and year above written.

PATRICK BURKE, [SEAL.]
WM. GARDNER, [SEAL.]
J. T. FAIRCHILD, [SEAL.]

Sealed and delivered in my presence, and by me approved, on the day of its date.

E. H. ENGLISH,
Chief Justice of the Supreme Court of Arkansas.

STATE OF ARKANSAS,
In the Supreme Court, sct.

In testimony that the foregoing twenty-six pages contain a full, true, and complete transcript of the record and proceedings of said supreme court, in the case therein stated, except the opinion of the court and briefs of counsel:

I, Luke E. Barber, clerk of said supreme court, have hereto set my hand and affixed the seal of said court, at my office, in the city of Little Rock, this 12th day of July, A. D. 1855. [SEAL.]

L. E. BARBER, *Clerk.*

Citation, and Acknowledgment of Service.

UNITED STATES OF AMERICA.

To William H. Gaines and wife Maria, Albert Belding, Henry Belding, and George Belding, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday in December next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Arkansas, wherein Patrick Burke is plaintiff, and you are defendants in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness E. H. English, chief justice of the supreme court of the State of Arkansas.

This 5th day of March, A. D. 1855.

E. H. ENGLISH.

We acknowledge due and legal service of this citation.
Little Rock, July 7th, 1855.

WATKINS & GALLAGHER,
Attorney for Belding's Heirs.